NO. 80 - 1643

IN THE

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ALEXANDER L. STE
CLERK

Supreme Court Of The United States

OCTOBER TERM, 1980

SILVER BULK SHIPPING, LTD.

Petitioner,

v.

WILLIAM McCARTHY

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

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I. PETITIONER'S CONCESSION THAT IT HAD IMPROPERLY MAINTAINED THE VESSEL'S HATCH COVERS WAS NOT A CONCESSION THAT IT VIOLATED THE STANDARD OF CARE IMPOSED ON VESSEL OWNERS UNDER THE LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT

Respondent asserts that "[s]ince the shipowner had conceded its negligence in the faulty maintenance of the hatch covers, no issue was presented as to the definition of the applicable standard of care such as presently before the Court in De Los Santos." (Brief for Respondent in Opposition, p. 5). Whether viewed in the pre or post De Los Santos context (the Court's Opinion in De Los Santos was filed after Respondent filed his Brief in Opposition), Respondent's conclusion does not follow from his premise. Moreover, it is belied by Petitioner's persistent argument at all stages below that the evidence did not establish its breach of a duty of care to Respondent under the Longshoremen's and Harbor Workers' Compensation Act ("Act").

Although Respondent suggests that it is inconsistent for Petitioner to concede improper maintenance of the vessel's hatch covers and still argue that it did not breach the standard of care imposed by the Act, there is no inconsistency. Depending on the circumstances, a vessel owner whose negligence causes a condition which, as a result of subsequent action or inaction on the part of a stevedore becomes a dangerous one, may be exonerated from liability to a longshoreman injured by such dangerous condition. Indeed, in De Los Santos, this Court pointed to its pre-Amendment decisions concerning the vessel owner's right to indemnity from the stevedore and clearly suggested that one of them, Crumady v. The J. H. Fisser, 358 U.S. 423 (1959), supports the conclusion that under the Amendments, a vessel owner should be excused from liability for a longshoreman's injuries despite the fact that its negligence contributed to them where the

vessel justifiably relied on the stevedore's expertise to prevent the injuries, Scindia Steam Navigation Co., Ltd. v. De Los Santos, No. 79-512, Slip op. at 16-17 (U. S. April 21, 1981).

The same result follows from the example provided by Congress in the Senate Report in support of the Amendments. According to that example, referred to in a footnote by this Court in De Los Santos, id. at 12 n. 16, a vessel would be liable to a longshoreman who slipped on an oil spill on the vessel's deck, where the vessel owner negligently put the oil on the deck, only if it willfully or negligently failed to remove it. The example does not impose liability ipso facto for negligently causing the oil to be on the deck. It allows for the exoneration of a vessel owner from liability based on its reliance on the stevedore to remove the oil. On this issue, at least the Fourth Circuit, in Anuszewski v. Dynamic Mariner's Corp.

Panama, 540 F.2d 757 (9th Cir. 1976), cert. denied, 429 U.S. 1098 (1979), refused to hold a vessel owner liable to a longshoreman for a dangerous condition caused by the antecedent negligence of the vessel owner. That Court affirmed the finding of the District Court for the District of Maryland that the vessel owner's negligence did not result in vessel owner liability because of its justifiable reliance on the stevedore to eliminate the dangerous condition.

In the instant case, the District Court rejected Petitioner's contention that it should be exonerated from liability to Respondent despite its antecedent negligence. Instead, the District Court accepted Respondent's equation of the Petitioner's improper maintenance of the hatch covers with a breach of duty under the Act (Appendix at p. 33a.). Consequently, the District Court precluded Petitioner from presenting evidence and arguing that the stevedore was

responsible for Respondent's injuries. The case was submitted to the jury only on the narrow factual issue of whether the leakage of seawater into the hold was a substantial factor in causing the accident. It is clear, therefore, that the District Court's rulings on evidence and points for charge, and not Petitioner's modest concession, eliminated from the jury's consideration the factual question whether Petitioner breached its duty under the Act and left Petitioner to argue only that as a matter of law its duty had not been breached.

II. THE JURY'S FINDING THAT THE CONDITION OF THE SUGAR COULD NOT HAVE BEEN REMEDIED BY A REASONABLE STEVEDORE DOES NOT SUPPORT THE CONCLUSION THAT PETITIONER BREACHED THE DUTY OF CARE IMPOSED BY THE ACT.

Respondent argues that the standard of care issue is moot since the jury found that a "reasonable" stevedore could not have remedied the frozen sugar. Logic does not support this position. First, under the Act, a vessel owner may be liable only for a breach of a duty it

owes. The fact that a stevedore is not able to remedy a condition created by the vessel owner does not in and of itself mandate that the vessel owner's duty has been breached. Second, the jury's determination was made following the District Court's exclusion of evidence highly relevant to what the positive law requires of a "reasonable" stevedore. Therefore, that determination was not dispositive of any of the issues presented in the Petition.

In De Los Santos, this Court clearly recognized that there will be circumstances where the stevedore, if unable to correct a dangerous condition, must cease operations and permit the vessel owner an opportunity to correct the condition before the vessel may be held liable to a longshoreman injured as a result of the condition. Id. at 20-21. Alternatively, if the vessel owner learns of the dangerous condition independently, the vessel owner may be required to eliminate the

hazard. Id at 21. As concerns the latter, there is no evidence that Petitioner learned of the hazard independently. Thus, liability based on actual knowledge of the hazard is untenable. With respect to the former, the stevedore did not stop work or report the hazard to Petitioner and did not ask Petitioner to remedy the dangerous condition. In fact, the record establishes that the stevedore would have prevented any attempt by Petitioner to remove the frozen sugar. Accordingly, Petitioner's liability on this theory also is without foundation.

The fact that this Court in De Los Santos pointed to statutory and regulatory law as a major source of evidence from which the jury is to determine if a vessel owner has a duty to correct a dangerous condition highlights the second flaw in Respondent's reliance on the jury's answer to the Interrogatory. That defect stems from the District Court's exclusion of evidence most pertinent to

what the positive law requires of a "reasonable" stevedore, that is, the OSHA Regulations for Longshoring. These regulations, which require the stevedore to prevent cargo from falling during discharging operations, were not followed in this case. The record below shows unequivocably that the stevedore made no special effort to dislodge the frozen sugar or prevent it from falling when routine procedures failed to dislodge it. Had the jury been advised of the duty imposed on the stevedore by the OSHA Regulations, the Interrogatory might will have been answered differently.

III. A STEVEDORE'S DUTY OF CARE TO ITS LONGSHOREMEN AND BREACH THEREOF ARE RELEVANT TO A VESSEL OWNER'S LIABILITY UNDER THE ACT.

Respondent argues that the decision of the District Court barring evidence of the stevedore's duty and breach thereof was mandated by Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979). As indicated, De Los Santos rejects this argument. Moreover, De

Los Santos mandates that Petitioner be granted a new trial as a result of the District Court's erroneous ruling.

One of the major premises of De Los Santos is the requirement that the vessel owner's duty to a longshoreman under the Act not be considered in a vacuum. Instead, the Court made it clear that a jury deciding a §905(b) case must be apprised of the duties the law places on both the vessel owner and the stevedore in order to evaluate the vessel owner's liability. The Court stated:

> As we have indicated, the legal duties placed on the stevedore and the vessel's justifiable expections that those duties will be performed are relevant in determining whether the shipowner has breached its duty. The trial court and where appropriate, the jury, should thus be made aware of the scope of the stevedore's duty under the positive law. Id at 19.

During the trial of this case, the District Court prevented Petitioner from introducing evidence of the stevedore's duty and thus prevented argument designed

to convince the jury that it was the stevedore's breach of that duty and not Petitioner's conduct which was legally responsible for Respondent's injuries. Accordingly, the major premise of this Court in De Los Santos was improperly rejected by the District Court, and improperly endorsed by the Court of Appeals for the Third Circuit in affirming the District Court's judgment.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the instant Petition, reverse the judgment of the Third Circuit Court of Appeals and remand this case for a new trial.

Respectfully submitted,

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